In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-478

PARKER SEAL COMPANY,
Petitioner,

vs.

PAUL CUMMINS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

AMICUS CURIAE BRIEF OF TRANS WORLD AIRLINES, INC. IN SUPPORT OF PETITIONER PARKER SEAL COMPANY

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AMICUS CURIAE BRIEF OF TRANS WORLD AIRLINES, INC. IN SUPPORT OF PETITIONER PARKER SEAL COMPANY

Trans World Airlines, Inc. (hereinafter referred to as "TWA"), as *amicus curiae*, supports Parker Seal Company, the petitioner (hereinafter referred to as "Parker Seal"), in praying that the judgment of the United States Court of Appeals for the Sixth Circuit entered herein on May 23, 1975, be reversed. This *amicus curiae* brief is submitted by TWA upon the consent of all the parties pursuant to Supreme Court Rule 42. The written consents have either been filed or will soon be filed with the Clerk of the Court.

I. OPINIONS BELOW

The opinion of the court of appeals is reported at 516 F.2d 544. The opinion of the district court is unreported. The opinion of the Kentucky Commission on Human Rights is unreported.

II. JURISDICTION

The judgment of the court of appeals was entered May 23, 1975. A timely petition for rehearing was denied by order entered July 18, 1975. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). On or about March 1, 1976, this Court granted the petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit.

III. CONSTITUTIONAL PROVISION, STATUTE AND REGULATIONS INVOLVED

The establishment clause of the First Amendment provides: "Congress shall make no law respecting an establishment of religion. . . ."

Section 701(j) of the Civil Rights Act of 1964, as amended, provides:

> "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue

> hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j) (Supp. II, 1972).

Section 703(a)(1) of the Civil Rights Act of 1964, as amended, provides in pertinent part:

> "It shall be an unlawful employment practice for an employer . . . to . . . discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's . . . religion. . . ." 42 U.S.C. § 2000e-2(a)(1) (1970).

Section 703(h) of the Civil Rights Act of 1964, as amended, provides in pertinent part:

> "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply * * * different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system * * * provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin. * * *" 42 U.S.C. § 2000e-2(h).

Guideline 1605.1 of the United States Equal Employment Opportunity Commission provides in pertinent part:

> "[S]ection 703(a)(1) of the Civil Rights Act of 1964 . . . includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business.
>
> "[T]he employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable." 29 C.F.R. § 1605.1 (1974).

IV. QUESTIONS PRESENTED

TWA adopts the statement of questions presented by Parker Seal in its brief and petition for a writ of certiorari. Additionally, TWA respectfully submits that because of the widespread presence in industry throughout the nation of collective bargaining agreements containing seniority and other uniform work rules provisions, additional important questions inhere in such cases regarding what employers and unions must do in their respective efforts to reasonably accommodate the diverse religious practices of employees.

One such additional question is whether an employer can be required under the Civil Rights Act and establishment clause of the First Amendment to accommodate an employee's religious practices by (a) depriving, without union consent, more senior employees (who may or may not have any religious beliefs) of their seniority rights under a bona fide collective bargaining agreement that is completely nondiscriminatory against any religion; or (b) financing an employee's religious observances through payment of premium or overtime wages to a replacement?

V. STATEMENT OF THE CASE

This case is before the Court following extensive investigation and litigation before state and federal administrative agencies and the lower federal courts. The facts underlying petitioner's claim as well as a descriptive history of the prior investigation and litigation are fully and amply set forth in the brief of Parker Seal. Significantly, the trier of facts in *Parker Seal* (both the Kentucky Commission on Human Rights and the district court) found in favor of

Parker Seal. *Parker Seal* does not, however, include in its factual background a collective bargaining agreement containing nondiscriminatory seniority clauses and other provisions establishing uniform work rules of the kind TWA and many other employers have entered into with unions.

VI. INTEREST OF THE AMICUS CURIAE

TWA is a corporation engaged in the transportation by air of persons, property and mail in interstate and foreign commerce. It has some 37,000 employees of which approximately 53% are covered by contracts with unions, including some 15,000 employees covered under TWA's collective bargaining agreement with the International Association of Machinists and Aerospace Workers.

As a carrier by air, TWA is subject to Title II of the Railway Labor Act, as amended, which gives employees the right to organize and bargain collectively through representatives of their own choosing and imposes upon air carriers and their employees the duty to use every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle by negotiation all disputes arising between them.

TWA's interest in this case is direct because it is a party in *Hardison* v. *Trans World Airlines, Inc.*, 375 F. Supp. 877 (W.D. Mo. 1974), *rev'd* 527 F.2d 33 (8th Cir. 1975), *pet. for cert. filed* February 9, 1976 (No. 75-1126), which, unlike Parker Seal, presents the applicability of a nondiscriminatory collective bargaining agreement that did not lock-in the effects of past religious discrimination. Briefly, in *Hardison*, TWA was able to initially accommodate Hardison's Friday sundown to Saturday sundown Sabbath requirements; how-

ever, Hardison thereafter transferred, to suit his own convenience, to a new shift where he knew he did not have sufficient seniority to avoid Saturday work. TWA continued its efforts to again accommodate Hardison's religious practices but could not do so within the framework of the collective bargaining agreement. The union refused to waive or breach the agreement. The seniority provision was, by stipulation and court finding, completely nondiscriminatory and did not lock-in any effects of past religious discriminatory conduct. Hardison was the only person performing his essential job on the new shift and his seniority position would have required him to work on Saturdays. After Hardison was absent for several successive Saturdays and left work early on a Friday shift, a discharge hearing was held under the collective bargaining agreement and Hardison was discharged. Hardison did not thereafter cooperate with his local union in its efforts to pursue grievance procedures in respect to his discharge. After having the matter under advisement for 53 weeks, the Court of Appeals for the Eighth Circuit reversed the district court's decision in favor of TWA. The circuit court, in effect, gave preferential treatment to Hardison solely on the basis of his religion even though such treatment would require TWA to pay overtime wages to other employees and cause other employees to give up their seniority rights. Consequently, *Hardison* generates the above-noted additional question set forth by TWA.

VII. ARGUMENT

I. The Statute and Guideline Violate the Establishment Clause.

The existence of "grave constitutional questions" was raised in the first key case concerning accommodation of an employee's religious beliefs. *Dewey* v. *Reynolds Metals Co.*, 429 F.2d 324, 334 (6th Cir. 1970), *aff'd* by an equally divided court, 402 U.S. 689 (1971). After the *Dewey* decision, distinguished legal scholars have asserted that a construction of Title VII of the Civil Rights Act in the circumstances presented in this case and in *Hardison* would constitute a violation of the establishment clause of the First Amendment. Edwards and Kaplan, *Religious Discrimination and the Role of Arbitration Under Title VII*, 69 Mich. L. Rev. 599, 628 (1971). See also, law review note on recent developments in 44 Fordham L. Review 442 (1975).

Judge Celebrezze's challenging dissent identifies the danger inherent in the circuit court's decision. If Congress is permitted to breach the First Amendment by granting benefits to religion, it is thereby empowered to take away religious freedoms. The same concern was eloquently expressed in a slightly different vein by a great religious constitutional scholar, the late Paul G. Kauper, in 18 Mich. Law Quad. Notes No. 2, p. 17, 1974, "In our pluralistic society with its diverse religious elements no single religion can claim for itself a favored position in the law, and the law in turn may not reflect the views of a single religious community."

Application of the three-part test set forth in *Committee for Public Education and Religious Education and Religious Liberty* v. *Nyquist*, 413 U.S. 757 (1973), requires a finding that Title VII, as construed by the court of appeals, is violative of the establishment clause.

First, the statute and guideline lack a primary "secular legislative purpose". The legislative history of the 1972 amendment contains no suggestion that religious discrimination in employment was a problem requiring remedial legislation.[1] Rather, the purpose, as explained by its sponsor, Senator Randolph, was admittedly to stem the "dwindling of the membership of some religious organizations" which prohibit Saturday labor and because of a "possible inability of employers on some occasions to adjust work schedules to fit the requirements of the faith of some of their workers." 118 Cong. Rec. 705 (1972). Thus, the 1972 amendment and EEOC regulation were explicitly designed to benefit members of particular religious groups without regard to employers' normal work schedules or the rights of other employees who may not believe in that religion or who have no religious beliefs. The statutory purpose to foster religion could not be clearer.

Second, the statute and guideline have the direct and immediate effect of advancing religion. The law unquestionably requires an employer to discriminate in favor of

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1. There was at best sparse evidence of religious (as opposed to racial) discrimination before Congress when it passed the 1964 Civil Rights Act. According to Congressman Celler, Chairman of the House Judiciary Committee:

> We did not have very much testimony of discrimination on the grounds of religion. You will notice in one of the titles, religion is left out. . . .
>
> We had very little evidence—I do not think we had any of it insofar as the Committee on the Judiciary is concerned that any particular sect or religion had been discriminated against. 110 Cong. Rec. 1528-29 (1964).

Senator Randolph specifically mentioned the Orthodox Jews, the Seventh-Day Adventists, and the denomination to which he himself belonged, the Seventh-Day Baptists. In this connection he stated:

> My own pastor in this area, Rev. Delmar Van Horn, has expressed his concern and distress that there are certain faiths that are having a very difficult time, especially with the younger people. . . . 118 Cong. Rec. 705 (1972).

individual employees on the basis of their religious beliefs. Illustratively, the *Parker Seal* court held, in effect, that Cummins must be accorded preferential treatment solely because of his religious beliefs. Similarly, *Hardison* required an employer to incur overtime charges for replacement employees, reduce the work coverage of other areas, or violate, without union consent, a bona fide and nondiscriminatory seniority provision in order to accommodate an employee's religious beliefs. Governmental sanction is placed upon the practice of facilitating and encouraging employees to require time off for religious observances so that employees with religious beliefs are aided as against nonbelievers. The government, in essence, is requiring that special preferences be given to certain employees over others solely because of religious beliefs. Thus, there simply is no evidence that the law is "evenhanded in operation" or "neutral in primary impact." *Gillette* v. *United States*, 401 U.S. 437, 450 (1971).

To meet the requirement of a clearly secular purpose, the law must be neutral as it affects believers and nonbelievers as well as neutral in intent and effect. *Everson* v. *Board of Education*, 330 U.S. 1, 15 (1947); *Committee for Public Education & Religious Liberty, supra;* and *Torasco* v. *Watkins*, 367 U.S. 488, 495 (1961). In application, the 1972 amendment and guideline require nonbelieving employees to bear the burden, inconvenience and expense of the varying religious practices of others.[2] Specific religions undoubtedly will benefit at the expense or burden of

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2. In criticizing the thrust and impact of the EEOC's regulations, Edwards and Kaplan present compelling hypotheticals and arguments undercutting the constitutional framework for both the regulation and the statute as later amended. See page 628 of their above-noted article. The authors criticize the EEOC guidelines, *inter alia*, because they appear to be premised on a fundamentally distorted conception of the proper place of religion in a secular society.

persons who do not have that religion. Thus, as construed by the court of appeals, the law is not neutral in either intent or effect.

While there is no need to reach the third part of the test, the statute and guideline patently require pervasive and excessive government entanglement with religion. The law requires a court to make a determination as to the sincerity and depth of the employee's beliefs.[3] The court must then evaluate the employer's efforts to accommodate thereby involving courts in a most subjective area. The danger of placing the government in the position of determining whether an employer has reasonably accommodated an employee's religion is illustrated by the striking number of times, including *Parker Seal* and *Hardison,* in which findings of fact in religious discrimination cases have been reversed.[4] If judges in the federal court system cannot agree what factual context constitutes reasonable religious accommodation, an area which common sense and history tells us is very subjective and volatile, it is too great a burden for the government to *require* an employer to accommodate an employee's religious practices by giv-

3. See 44 Fordham L. Rev. 442, 449; n. 61 (1975).

4. The following eight decisions involve reversals of district court findings and opinions in the religious discrimination area. *Dewey* v. *Reynolds Metals Company,* 429 F.2d 324 (6th Cir. 1970); *Riley* v. *Bendix Corporation,* 464 F.2d 1113 (5th Cir. 1972); *Reid* v. *Memphis Publishing Company,* 468 F.2d 346 (6th Cir. 1972); *Young* v. *Southwestern Savings & Loan,* 509 F.2d 140 (5th Cir. 1975); *Cummins* v. *Parker Seal Company,* 516 F.2d 544 (6th Cir. 1975); *Reid* v. *Memphis Publishing Company,* 521 F.2d 512 (6th Cir. 1975); *Draper* v. *U. S. Pipe & Foundry,* 527 F.2d 515 (6th Cir. 1975); and *Hardison* v. *Trans World Airlines, Inc.,* 527 F.2d 33 (8th Cir. 1975). In *Johnson* v. *United States Postal Service,* 497 F.2d 128 (5th Cir. 1974) and *Roberts* v. *Hermitage Cotton Mills,* 8 F.E.P. 315 (D.C.S.C. 1974), *aff'd* 8 F.E.P. 319 (4th Cir. 1974), district court findings were held not to be clearly erroneous. The latter two cases held for the employer and are factually similar to *Parker Seal* and *Hardison.*

ing that employee preferential treatment to the detriment of other employees.

Moreover, the EEOC has promulgated extensive, and oftentimes contradictory, guidelines governing what an employer must do under the law. *Yott* v. *North American Rockwell,* 501 F.2d 398 (9th Cir. 1974). Those guidelines affect the employer, the accommodated employee and all other employees. The government is thus inextricably involved in serious practical problems for employers, employees and labor organizations in the scheduling of work assignments and the application of other uniform work rules so as not to conflict with the large variety of existing religious practices.[5]

In the final analysis, whether it is more important for a junior employee to practice his religion or for another more senior man, who may or may not have any religious beliefs, to spend a Saturday with his family is a question that is for individual choice. The establishment clause of the First Amendment prevents the government and the federal courts from imposing their views as to what religious sacrifices or accommodations are nec-

5. As of April, 1975, approximately 77,994,000 persons were employed in non-agricultural establishments, including manufacturing, wholesale and retail trade, government, transportation and public utilities, finance, insurance and real estate, contract construction and mining. U.S. Bureau of the Census, *Statistical Abstract of the United States: 1975,* Table No. 579 at p. 353 (96th ed. 1975).

Membership in religious bodies for the year 1973 totaled 131,245,000. Some denominations celebrating a Sabbath which commences on Friday sundown and ends on Saturday, include the following: Seventh-Day Adventists—464,000; Jewish—6,115,000.

The burden imposed upon an employer is by no means limited to reasonably accommodating Sabbatarians. Many Americans are affiliated with non-Judeo-Christian religions which celebrate entirely different holidays. The only such religion with a membership in excess of 50,000 is the Buddhist persuasion—60,000. *Id.,* Table No. 63 at p. 46.

essary in secular living, particularly in situations in which a nondiscriminatory seniority provision establishes a uniform rule for all persons.

Title VII, as misconceived by the court of appeals, completely overlooks the teaching of Learned Hand in *Otten* v. *Baltimore & O.R.R.*, 205 F.2d 58, 61 (2d Cir. 1953) wherein the importance of proper deference to the need for an individual to also accommodate and compromise his religious beliefs was cogently stated:

> "The First Amendment protects one against action by the government . . . but it gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessity. . . . We must accommodate our idiosyncracies, religious as well as secular, to the compromises necessary in communal life; and we can hope for no reward for the sacrifices this may require beyond our satisfaction from within, or our expectations for a better world."

The need for some flexibility on the part of the concerned employee to accommodate or adjust his religious idiosyncracies is illustrated by both *Parker Seal* and *Hardison*. Parker Seal actually accommodated Cummins until business exigencies required work adjustments. TWA also accommodated Hardison until he voluntarily bid into a new shift where he knew he would have difficulty in observing his Sabbath. In both cases, the employer was unable to make subsequent accommodations. Yet, the decisions by both courts of appeal place the entire burden of accommodation upon the employers despite their obvious good faith efforts to be more than fair to all parties.

II. The Interpretation of the Statute and Guideline by the Court of Appeals Results in Innumerable Recurrent Nationwide Problems in the Administration of Uniform Work Rules.

The decision of the court of appeals in *Parker Seal*, far from enhancing less discrimination in employment, will require the employer and union to shift employees out of seniority and dispossess them of the protection of other uniform work rules to accommodate diverse religious beliefs. Indeed, the holdings in *Parker Seal* and *Hardison* result in it being virtually impossible for an employer with a large labor force to demonstrate any "undue hardship" in reasonably accommodating religious practices of its employees. The need to reverse the problems created by the decisions in *Parker Seal* and *Hardison* is heightened by the innumerable and inevitable conflicts thrust upon the thousands of employers and unions across the country that are governed in their relations by collective bargaining agreements, which, in the language of 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), ". . . are not the result of an intention to discriminate because of . . . religion. . . ."

Many industries operate under collective bargaining agreements pursuant to important federal statutory schemes such as the Railway Labor Act (45 U.S.C. § 151, et seq.) and the National Labor Relations Act (29 U.S.C. § 151, et seq.). Those collective bargaining agreements cover thousands of employees. To require an employer, like TWA, to accommodate the various religious idiosyncracies of its thousands of employees would pose insurmountable problems in the performance of its seven-days-a-week airline operations. Those problems are magnified to crisis proportion when employers are required to vi-

olate bona fide and completely nondiscriminatory seniority principles or other uniform work rules of collective bargaining agreements to accommodate the varying religious needs of thousands of employees. Furthermore, in the absence of a past pattern of religious discrimination, depriving a more senior employee of hard-earned seniority rights or other uniform work rules is counterproductive to cardinal provisions of the Railway Labor Act and the National Labor Relations Act.[6]

Accommodation of employee religious beliefs frequently simply cannot be made without disruption of work schedules and creation of inequitable or unfair preferential personnel practices. Many industries, like TWA, are engaged in continuous process operations. Shift stability and other uniform work rules are essential to avoid slowdowns, backups, wasted manpower and material, and, in TWA's case, to maintain airline schedules for the benefit of the public. Such industries, like TWA, operate twenty-four-hours-per-day, seven-days-a-week and 365 days each year.

The court of appeals places the employer in an intolerable position. If he is a large employer, it is virtually impossible to prove an undue hardship. The employer must grant employees with diverse religious needs special privileges by requiring other employees (who may not even have any religious beliefs) to forego legitimate seniority rights. Additionally, the employer must incur grievances, morale and work scheduling problems and the extra cost of overtime replacements while the excused employee would have the option to observe his particular religious beliefs.

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6. The importance of seniority in our national labor relations policy is well set forth in *Edwards & Kaplan, supra,* at 639.

Illustrative of the many other uniform work rules which the large employer and unions will find difficult, if not impossible, to justify, unless the decisions in *Parker Seal* and *Hardison* are reversed, will be the payment of union dues or union shop agreements. See, for example, *Yott* v. *North American Rockwell,* 501 F.2d 398 (9th Cir. 1974). See also the dissent of Judge Celebrezze in *Parker Seal.*

CONCLUSION

Based upon all of the foregoing, TWA respectfully prays that the Court reverse the decision and judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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MOTION OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF AS AMICUS CURIAE

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MOTION OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The International Association of Machinists and Aerospace Workers [hereinafter, "IAM"], pursuant to Rule 42(3) of the Rules of this Court, respectfully requests leave to file the attached brief as an *amicus*

curiae in the case *sub judice*. On April 26, 1976, the IAM requested the consent of both parties to file a brief as an *amicus curiae,* and on may 6, 1976, counsel for petitioner stated that they did not object to the IAM filing a brief as an *amicus curiae*. Counsel for respondent, however, informed the IAM by a letter dated April 30, 1976, that they would not voluntarily consent to the *amicus curiae* participation of the IAM.

INTEREST OF THE IAM

The IAM is a labor organization within the meanings of the National Labor Relations Act, the Railway Labor Act, and Title VII of the Civil Rights Act of 1964, and as such represents almost one million workers throughout the United States in their employment relationship. In furtherance of that representation, the IAM, either through the International or its subordinate units, is a party to over two thousand collectively bargained for agreements which detail the rates of pay, rules, or working conditions of its members and others covered by those agreements.

Since Title VII of the Civil Rights Act of 1964 in part governs both the employer-employee relationship and the relation between a union and those it represents, the IAM always has an interest in cases construing the reach of that statute. That interest is substantial in the case at bar, it is submitted, because of the subjective and diverse nature of questions of religious discrimination, and because of the virtual lack of any meaningful guidance from either the Equal Employment Opportunity Commission or the courts of appeals in approaching claims of religious discrimination. This lack of meaningful guidance is particularly perplexing to the IAM since it must fairly represent not only the employee asserting discrimination, but also the employees who under existing laws and regulations must, in many cases, pay the price of the accommodation of the first employee's religious beliefs.

Unlike that of either petitioner's or respondent's, the IAM's interest in the case at bar extends beyond the "Sabbath observance" question squarely presented by the facts of the case at bar, to the enforceability of contractual provisions, such as a "union shop" agreement which may well be affected by the approach chosen by this Court to answer the challenge to the constitutionality of Title VII's ban on religious discrimination. *Compare, Yott* v. *North American Rockwell Corp.*, 501 F.2d 398 (9th Cir. 1974), *with, McDaniel* v. *Essex International, Inc.,* W.D. Mich., No. G74-288 C.A., decided January 13, 1976, as modified March 15, 1976, appeal pending (unreported; attached as Appendix A to brief); *see also, Hardison* v. *Trans World Airlines, Inc.*, 527 F.2d 33 (8th Cir. 1975), petitions for writ of *certiorari* pending, Sup. Ct. Nos. 75-1126, 75-1385. Since the IAM's interest extends beyond the four corners of the case *sub judice* to the entire area of religious discrimination in employment, it is believed that the brief which *amicus curiae* is requesting permission to file will treat the broader aspects of the matter at issue; this approach will not, it is submitted, broaden the issues presently before this Court.

WHEREFORE, the IAM respectfully requests that it be granted leave to file the attached brief as an *amicus curiae* in the case at bar.

Respectfully submitted,

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BRIEF FOR THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS AS AMICUS CURIAE

On May 23, 1975, the United States Court of Appeals for the Sixth Circuit issued its decision in the case at bar, 516 F.2d 544, reversing the findings of the United States District Court for the Eastern District of Kentucky that petitioner had not violated Title VII's ban on religious discrimination when it discharged respondent for refusing to work on Saturdays. Concluding that the district court's finding of fact was unsupported by substantial evidence when it had found, as had the administrative agency which first considered respond-

ent's claim,[1] that a further accommodation of respondent's religious practices would have imposed an undue hardship on the conduct of petitioner's business, a majority of the appellate panel set aside that ultimate finding. Pet. App. D at 28a. The Court then proceeded to make its own finding that petitioner had "discriminated against . . . [respondent] on the basis of his religion in violation of Title VII of the Civil Rights Act of 1964 [42 U.S.C. § 2000e, *et seq.*]." *Id.* at 31a. Having made that determination, the appellate court considered and rejected a challenge to the constitutionality of 29 C.F.R. § 1605.1 (the Equal Employment Opportunity Commission regulation in effect today and at the time of respondent's discharge) and its subsequent codification in Section 701(j) of the Civil Rights Act of 1964, as amended in 1972 (42 U.S.C. § 2000e(j)). One judge, Judge Celebrezze, dissented on the grounds that as construed by the majority, Title VII's ban on religious discrimination affronted the Establishment Clause of the First Amendment. After unsuccessfully petitioning for rehearing (Pet. App. F), petitioner filed its petition for a writ of *certiorari* in this Court, and on March 1, 1976, that petition was granted to consider, among other questions, the issue of the constitutionality of the statute as construed and applied by the Sixth Circuit.

The International Association of Machinists and Aerospace Workers [hereinafter, "IAM"] respectfully submits this brief as *amicus curiae* in support of the position that the judgment of the Court of Appeals be reversed.

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[1] Respondent's claim was first considered and rejected by the Kentucky Commission on Human Rights. The decision of that body is reproduced in the Appendices to the Petition for a Writ of *certiorari* as Appendix A at pp. 1a-6a. Hereinafter, "Pet. App." refers to the Appendices attached to the petition.

INTEREST OF THE IAM

As the duly designated representative of almost a million workers, the IAM has a substantial interest, and, in fact, a duty to assure that all whom it represents are treated fairly. *E.g., Steele* v. *Louisville & N.R.R.*, 323 U.S. 192 (1944). If the decision of the court of appeals is left to stand, however, it is inevitable that the rights of the majority will of necessity have to be subordinated to the religious beliefs of a minority, no matter how onerous an accommodation to those interests may be, for under the court of appeals decision, hindsight is the best sight. While the IAM submits that Title VII's ban on religious discrimination is a laudable restriction on private employment relationships, that ban as construed by the court of appeals, has become "a sword to cut through the strictures of the Establishment Clause" (Pet. App. D at 49a) and through the legitimate interests and rights of other employees.

This Court's decision on the issues *sub judice* is likely to have a significant impact upon the interpretation of Title VII of the Civil Rights Act of 1964, as amended, and thus upon the rights and duties of employees and employers under that Act. In discharge of its statutory duty to represent the interests of all employees within its jurisdiction, minority as well as majority, the IAM is respectfully submitting this brief to urge this Court to construe Title VII 's ban on religious discrimination so as to protect the free exercise of religion, but without affronting the freedom of others—employers and employees—not to support those religious beliefs.

STATEMENT OF THE CASE

The case *sub judice*, as will be developed more fully by petitioner in its brief, squarely presents a situation where an employer had evenly applied and enforced a work related rule until being confronted by respond-

ent Paul Cummins' demand that the rule yield to his religious beliefs. That rule—that all supervisors be available for wok when their shifts work—clearly aided Parker Seal in the conduct of its business. Respondent, however, claimed in 1970 (after five years of consistently abiding by that rule; but shortly after adopting the tenets of the World Wide Chuch of God) that since that rule required that he work on Saturdays, and since his religion prohibited him from working Friday sunset to Saturday sunset, petitioner could not enforce that rule for to do so would conflict with his religious beliefs. Parker Seal attempted to accommodate to respondent's religious practices, but in so doing caused problems to its efficient operations, and more importantly *amicus* submits, created dissension among respondent's fellow supervisors who were required to fill the gap in petitioner's operations left by respondent's observance of his religious beliefs.

In concluding that petitioner had Violated Title VII in discharging respondent because of his unavailability for work on Saturdays, a majority of the court of appeals concluded, in effect, that petitioner could not enforce work related rules if an operation of those rules placed a burden on an employee's exercise of his religious beliefs. Finding that petitioner could have taken other steps to alleviate the problems caused by respondent's unavailability for work on Saturday,[2] the appellate court concluded that, as a matter of law, the company had not complied with the commands of Title VII, which under the court of appeals view, required petitioner to shield respondent from the burdens of his religious beliefs. *See*, Pet. App. D at

[2] According to the court of appeals, petitioner could have required respondent to work overtime during the week or on Sunday, or it could have reduced his pay accordingly. Pet. App. D at 29a; *but see*, Pet. at 14 n.8.

35a. Discounting the strength of the dissension among respondent's fellow employees, including his own brother-in-law, the appeals court reasoned that while it was "conceivable that employee morale problems could become so accute that they would constitute an undue hardship [,]" the facts in this case did not rise to that level. Pet App. D at 29a. Apparently, as the court noted, only "chaotic personnel problems" would cause an undue hardship under either 29 C.F.R. § 1605.1 or Section 701(j) of Title VII. *Id.* Even though the court of appeal's view of Section 701(j)[3] required an employer to discriminate against its other employees because of respondent's religious beliefs, a majority of that panel concluded that the accommodation requirement did not affect the Establishment Cause of the First Amendment.

Unfortunately, the Sixth Circuit in *Cummins* is not alone in its view of the reach of Title VII. *See, Hardison* v. *Trans World Airlines, Inc.*, 527 F.2d 33 (8th Cir 1975), *pets. for cert. pending.* Under the approach to Title VII taken by the *Cummins* Court, rules which have been developed over the years to govern the employment relationship, such as *bona fide* seniority provisions, and which have been evenly applied and enforced must be waived for those who claim that those rules interfere with the exercise of their religious beliefs. This interpretation of Title VII does not, it is submitted, simply extend the First Amendment protection of the free exercise of religion to private employment; it expands those protections to require others "to pay" for another's exercise of religion. This forced payment may be in the form of forced overtime,

[3] Although respondent's discharge occurred prior to the enactment of Section 701(j), 42 U.S.C. § 2000e(j), the court of appeals considered the constitutionality of that section since, as it stated, "for purposes of this case there is no difference between the Regulation [§ 1605.1] and the amendment." Pet. App. D at 19a. *Amicus* agrees.

loss of weekends off or, in the case of union shop agreements, actual financial support of another's union representation when that employee refuses to pay "dues" because of religious beliefs.

ARGUMENT

I. WHILE CONGRESS MAY LAWFULLY REQUIRE EMPLOYERS AND EMPLOYEES TO NOT DISCRIMINATE AGAINST OTHER EMPLOYEES BECAUSE OF THEIR RELIGIOUS BELIEFS, CONGRESS IS PROHIBITED BY THE ESTABLISHMENT CLAUSE FROM REQUIRING THAT EMPLOYERS OR EMPLOYEES PAY FOR THE RELIGIOUS BELIEFS OF OTHER EMPLOYEES BY ACCOMMODATING THOSE BELIEFS.

Aware that among the inalienable rights enjoyed by all men are the freedoms of conscience and religion, and realizing that those rights could be abridged by the involvement of the State in religious affairs, the founding fathers provided that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U. S. Const. amend. I. By that provision with its inherent tension between both prongs, the founding fathers attempted to erect a wall of separation between church and state. However, as the history of the enforcement of the Religious Clauses clearly evidences, there is no ready test to determine with mathematical certainty when either Congress, or the States through the Fourteenth Amendment, have breached that wall of neutrality—a wall which at its best is loosely formed.[4] *E.g., Lemon* v. *Kurtzman,* 403 U.S. 602, 612, 614 (1971).

Over the years this Court has developed a three-pronged test to determine whether a legislative enact-

[4] As this Court stated in *Committee For Public Education* v. *Nyquist,* 413 U.S. 756, 760 (1973): "It has never been thought either possible or desirable to enforce a regime of total separation, and as a consequence cases arising under these Clauses have presented some of the most perplexing questions to come before this Court."

ment, or a judicial interpretation of that act, violates the Establishment Clause. In order to pass muster under the Establishment Clause:

> First, the statute must have a secular legislative purpose. . . . Second, it must have a "primary effect" that neither advances nor inhibits religion. . . . Third, the statute and its administration must avoid excessive government entanglement with religion. *Meek* v. *Pittenger,* 421 U.S. 349, 358 (1975).

But as the Court warned in *Meek, supra,* 421 U.S. at 359: "[T]he tests must not be viewed as setting the pricise limits to the necessary constitutional inquiry, but serve only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired." In essence, the three-pronged test is a balancing one in which this Court ultimately determines whether the government has become involved in religious affairs so as to place its force and power behind the demand of one group that others support by actions, sacrifice or "taxes" the religious beliefs of the demanding group.[5] *Amicus* respectfully

[5] That the essence of the Religious Clauses is the prohibition on the government from requiring some to pay for the *religious beliefs* of others, is inferable from the precursor to the First Amendment religious prohibitions, the Bill for Establishing Religious Freedom enacted by Virginia in 1786. That Act provided in pertinent part:

> Well aware that Almighty God hath created the mind free; . . . that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; . . . .
>
> *We, the General Assembly, do enact,* That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burdened in his body or goods, nor shall otherwise suffer, on account of his religious opinions or belief . . . .

See, Everson v. *Board of Education,* 330 U.S. 1, 28 (1947) (Rutledge, J. dissenting).

submits that the tension between the two clauses of the Religious Clauses is never so taut, and consequently the caveat of *Meek* never so critical, as when Congress enacts a law to prohibit religious discrimination. Since Title VII is such a law, it must be examined closely to determine if Congress exceeded its permissible bounds.

A. History of Title VII's ban on religious discrimination.

When Congress was considering the various precursors to, and then the bill itself which eventually was enacted into law as the Civil Rights Act of 1964, 78 Stat. 241 (1964), it is fair to say that Congress was mainly, if not primarily, concerned with racial discrimination. For example, the Chairman of the House Judiciary Committee, Representative Celler, stated:

> We had testimony concerning religion. We did not have very much testimony of discrimination on the grounds of religion. You will notice in one of the titles, religion is left out.
>
> . . . .
>
> We had very little evidence—I do not think we had any of it insofar as the Committee on the Judiciary is concerned that any particular sect or religion had been discriminated against. 110 Cong. Rec. 1528 (1964). *See also, Id.* at 1529.

From *amicus'* review of the congressional material, it appears that Representative Celler's experience was indicative of that of the other Committees involved; but yet when "religion" was added to prohibited subjects of discrimination, it was routinely included. While there was much evidence of racial discrimination, by statistics and direct evidence, there was little testimony relating to religious discrimination. *See, Hearings on S. 773, S. 1210, S. 1211, and S. 1937 Before Subcommittee on Employment and Manpower of the Senate Committee on Labor and Public Welfare,* 88th Cong., 1st Sess. at 196-208, 431-62 (1963). When Congress was presented with evidence of religious discrimination, that evidence apparently pertained to overt and intentional discrimination. *Id.* at 464-65. Congress gave considerable thought to whether it had the authority to prohibit racial discrimination in private employment (*e.g., Id.* at 127-33), but there is little, if any, evidence that Congress considered whether the Establishment Clause limited its power to prohibit religious discrimination.

Almost a year after Title VII became effective, the EEOC issued guidelines to cover compliance with Title VII's ban on religious discrimination. 31 Fed. Reg. 8370 (1966). In those guidelines, the Commission stated that an employer could be in violation of Title VII if it failed to accommodate the "reasonable religious need of employees . . . where such accommodation can be made without serious inconvenience to the conduct of the business." *Id.* That regulation, however, specifically limited the duty to accommodate:

> [T]he Commission believes than an employer is free under Title VII to establish a normal work week . . . generally applicable to all employees, notwithstanding that this schedule may not operate with uniformity in its effect upon the religious observances of his employees . . . .

See also, Id. at § 1605.1(b)(3). In July 1967, the Commission issued new guidlines on religion which are still in effect. 29 C.F.R. § 1605.1. Under those new regulations, an employer has a duty "to make reasonable accommodations to the religious needs of employees . . . where such accommodations can be made without undue hardship on the conduct of the employer's business." Section 1605.1(b). But, instead of attempting to lay down specific guidlines as it had done before, the Commission stated that it would review each case on an individual basis (Section 1605.1

(d)), and that the burden was on the employer to prove that "an undue hardship renders the required accommodations to religious needs of the employee unreasonable." Section 1605.1(c).

As could be expected, the 1967 regulation received a mixed response from the courts. *Compare*, *Dewey* v. *Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided Court*, 402 U.S. 689 (1971), *with*, *Reid* v. *Memphis Publishing Co.*, 468 F.2d 346 (6th Cir. 1972). Confronted with what he believed to be a threat to the full permissible reach of Title VII's ban on religious discrimination, Senator Randolph on January 21, 1972, introduced an amendment on the Senate floor to S. 2515, the bill which eventually became the Equal Employment Opportunity Act of 1972, 86 Stat. 103 (1972). Senator Randolph proposed that, in order to carry "through the spirit of religious freedom under the Constitution of the United Staes" (118 Cong. Rec. 706 (1972)), a new subsection be added to Section 701, the definitional section of Title VII:[6]

> (j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's, religious observance or practice without undue hardship on the conduct of the employer's business. 118 Cong. Rec. 705 (1972).

This amendment was necessary, Senator Randolph stated, because the courts, including this Court in

[6] Senator Randolph's amendment was couched in definitional terms apparently to counter the contention of the Sixth Circuit in *Dewey* v. *Reynolds Metals Co.*, *supra*, 429 F.2d at 335, that:

> The fundamental error of Dewey and the Amici Curiae is that they equate religious discrimination with failure to accommodate. We submit these two concepts are entirely different. The employer ought not to be forced to accommodate each of the varying religious beliefs and practices of his employees.

Dewey, had not given Title VII's ban on religious discrimination its full and proper reach. As the Senator said:

> I think in the Civil Rights Act we thus intended to protect the same rights in private employment as the Constitution protects in Federal, State, or local governments. Unfortunately, the courts have, in a sense, come down on both sides of this issue. The Supreme Court of the United States, in a case involving the observance of the Sabbath and job discrimination, divided evenly on this question.
>
> This amendment is intended, in good purpose, to resolve by legislation—and in a way I think was originally intended by the Civil Rights Act—that which the courts apparently have not resolved. I think it is needed not only because court decisions have clouded the matter with some uncertainty; I think this is an appropriate time for the Senate, and hopefully the Congress of the United States, to go back, as it were, to what the Founding Fathers intended. 118 Cong. Rec. 705-06 (1972).

Senator Randolph's amendment was accepted, and it became law when the Equal Employment Opportunity Act of 1972 was enacted on March 24, 1972. As is readily apparent from comparison of Section 701(j) and 29 C.F.R. § 1605.1(b) and (c), Senator Randolph's amendment codified the challenged EEOC regulation.

While Section 706(g) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g), implies that Title VII prohibits only intentional discrimination, this Court has made clear in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), that Title VII is not directed simply to the motivation of employment practices; "the thrust of the Act [is directed] to the *consequences* of employment practices . . . ." *Id.* at 432 (emphasis in original).

> Congress did not intend by Title VII, however, to guarantee a job to every person regardless of

> qualifications. . . . Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification. *Id.* at 430-31.

Under this formulation of the reach of Title VII, a work rule which is neutral on its face may yet be discriminatory if in operation it acts to exclude members of a protected group. However, where a work rule is reasonably job related, it is not unlawful since a rule which measures the man for the job, and not the man in the abstract, is proper. *Id.* at 436.

Section 701(j), however, goes further. Under the accommodation requirement of that section, a work rule which is clearly job related (such as in the case at bar) and evenly applied and enforced, may be in violation of Title VII if the employer or union does not reasonably attempt to avoid curtailing the employee's religious beliefs. Consequently, under the accommodation requirement, employers and unions are forced to discriminate in favor of an employee's religious beliefs. *Amicus* IAM submits that such a requirement is contrary to the commands of the Religion Clauses.

B. Title VII's accommodation requirement is actually a command that employers and unions yield to all claims of alleged discrimination because of religious beliefs, regardless of their merit.

As it may now be read, and as it has recently been construed by both the court of appeals in this case [7]

[7] *See also, Hardison* v. *Trans World Airlines, Inc.*, 527 F.2d 33 (8th Cir. 1975), *pets. for cert. pending*, Sup. Ct. Nos. 75-1126, 75-1385; *but see, Johnson* v. *U.S. Postal Service*, 497 F.2d 128 (5th Cir. 1974).

and the EEOC in its current regulation and its decisions, [8] Title VII's ban on religious discrimination effectively requires an employer and a union to yield to an employee's religious beliefs, no matter how onerous that demand may be upon their operations. This is so because under the present state of the law, there are no hard and fast guidelines in this area,[9] and each instance of a refusal to yield by either an employer or union is liable to be subjected to the long and drawn out review procedures of both the EEOC and the courts.[10] And since the burden is on the employer and the union to prove the negative—*i.e.*, that *no* reasonable accommodation imaginable was possible—the chances of ultimately prevailing on the merits are, at best, minimal. If what was believed to have been unreasonable is subsequently found through hindsight to not have gone far enough in accommodating, both employer and union may well be required to pay a large judgment in back pay and costs—including attorney's fees—even though there was no intent to discriminate because of religion, and even though the employee was treated the same as every other employee. *Albemarle Paper Co.* v. *Moody*,

[8] *See*, decisions cited at Pet. App. D at 29a.

[9] *Compare, Yott* v. *North American Rockwell Corp.*, 501 F.2d 398 (9th Cir. 1974), *with, Linscott* v. *Millers Falls Co.*, 440 F.2d 14 (1st Cir.), *cert. denied*, 404 U.S. 872 (1971).

[10] This case demonstrates that the delay can be long; and the IAM respectfully submits that the delay in this case is far from unusual. In its Seventh Annual Report, the EEOC reported that for that fiscal year ended June 30, 1972, it has received 32,840 new charges. *Id.* at 36. During that year the Commission completed 10,668 cases and had 38,524 in progress at the end of the year. *Id.* In its Ninth Annual Report, the Commission stated that for the fiscal year ended June 30, 1974, it had received 56,000 charges, and had 78,400 on hand at the close of that year. *Id.* at 47. In that annual report the Commission stated that it hoped to reduce the average time required to process a charge from 26 months to 13 months. *Id.* at 8.

422 U.S. 405 (1975). Moreover, the realities of the situiation and alternatives confronting employers and unions when an employee demands that his religious beliefs take precedence over normal work related rules, may well force employers and union inevitably to yield to those religious beliefs.

A clear example of the reach of accommodation requirement as construed by the court of appeals below is *Yott* v. *North American Rockwell Corp., supra* note 9. In *Yott,* the Ninth Circuit was confronted with a challenge to a "union shop" provision which *Yott* claimed violated his religious beliefs not to join a union or support one by dues. Objections to union shop agreements on religious principles is not a recent innovation of Title VII, but rather presents a question which has previously been raised and rejected under the Free Exercise Clause. *E.g., Otten* v. *Baltimore & O. R. R.,* 205 F.2d 58 (2d Cir. 1953); *Wicks* v. *Southern Pacific Co.,* 231 F.2d 130 (9th Cir.), *cert. denied,* 351 U.S. 946 (1956); *Gray* v. *Gulf, M. & O. R. R.,* 429 F.2d 1064 (5th Cir. 1970), *cert. denied,* 400 U.S. 1001 (1971); *Linscott* v. *Millers Falls Co., supra* note 9; *Hammond* v. *Papermakers Union,* 462 F.2d 174 (6th Cir.), *cert. denied,* 409 U.S. 1028 (1972). Union shop agreements, which were in reality an accommodation of religious beliefs because of their limited enforcement rights, *e.g., NLRB* v. *Hershey Foods Corp.,* 513 F.2d 1083 (9th Cir. 1975), were found to be constitutional because the compelling governmental interest in requiring that all employees pay their fair share for union representation outweighed the individual right to the unrestricted exercise of his religion.. *See, Linscott* v. *Millers Falls Co., supra* note 9, 440 F.2d at 17-18.

Even though it agreed that the Free Exercise Clause did not prohibit Yott's employer from enforcing that

agreement, the *Yott* court concluded that Title VII's accommodation requirement might. *Yott* v. *North American Rockwell Corp., supra* note 9, 501 F.2d at 401-03. *Yott* thus clearly shows that the accommodation requirement of Section 701(j) may be construed to extend Title VII's protections past those guaranteed by the Free Exercise Clause and to require other employees to pay for an employee's exercise of his religion.

C. Title VII's accommodation requirement violates the position of neutrality required by the First Amendment.

Amicus does not quarrel with the concept that Congress could lawfully, through the commerce clause, prohibit religious discrimination in the private employment context. But since the reach of the Free Exercise Clause is limited by the Establishment Clause, Congress could do no more than simply extend the First Amendment protections for the free exercise of religious beliefs to private employment. And if this is what Congress has in fact accomplished, the test for determining free exercise questions set forth in *Sherbert* v. *Verner,* 374 U.S. 398 (1963), would, at first, appear applicable. In *Sherbert,* as in *Griggs,* this Court concluded that a neutral requirement—disqualification for unemployment benefits due to not being available for work on Saturdays—operated to impose a burden on Sherbert's free exercise of her religion. *Id.* at 403-06. That, however, did not end the inquiry for the free exercise right is not absolute and may be subordinated to a compelling governmental interest. While a mere rational relationship will not suffice to show a compelling state interest, the state is not required to show that all other forms of state action to achieve that end are entirely impractical. *See Braunfeld* v. *Brown,* 336 U.S. 599 (1961). That, however, is exactly what

the accomodation requirement, as construed by the court of appeals, requires

While it is clear that Congress, because of the tension inherent in the Religion Clauses, could do no more than extend the Free Exercise Clause protections to private employment, a serious question arises as to whether Congress could go even that far in the private employment context. Unlike a State, an employer and his employees have a right to the free exercise of their religious beliefs, and its corollary, the right to be free from supporting another's religious practices. Since a strict application of the "compelling State interest" test of *Sherbert* to private employment, rather than the "rational basis" standard of the Equal Protection Clause, will cause discrimination *in favor* of an employee's religious beliefs and, will have a direct and identifiable effect on fellow employees and the employer, its application vitiates the Government's position of neutrality required by the Religion Clauses. *Accord, Committee For Public Education* v. *Nyquist*, *supra* note 4, 413 U.S. at 788-89. Moreover, governmental entanglement in religion becomes the rule, rather than the exception. In the case at bar, Congress in enacting Section 701(j), the EEOC in promulgating § 1605.1, and the court of appeals below in upholding those actions, have all failed "to maintain an attitude of 'neutrality,' neither 'advancing' nor 'inhibiting' religion." *Id.* at 788 (footnote omitted).

When the three-pronged test for the constitutionality of an enactment under the Establishment Clause is applied to this case, it becomes clear, *amicus* submits, that the accommodation requirement of the regulation and § 701(j) cannot stand. While it is apparent that Title VII's religious discrimination ban in both Sections 701(j) and 703 (42 U.S.C. § 2000e-2) is intended to remove a form of invidious discrimination from the

employment equation, *cf.*, *Griggs* v. *Duke Power Co.*, *supra*, 401 U.S. at 429-30, it is also clear that the act was intended "to assure that freedom from religious discrimination in the employment of workers is for all time guaranteed by law" Remarks of Senator Randolph, 118 Cong. Rec. 705 (1972). Title VII's religion provisions, consequently, are not strictly secular in purpose for one of their main purposes is to aid the exercise of religious practices. That realization, however, does not condemn Title VII's religion provisions for, it is submitted, the Free Exercise and the Equal Protection clause may permit a law to implement their commands. This religious purpose, though, is an important factor to be weighed in the final balancing of whether the government's neutrality has been lost by the Act.

When the second prong of the Establishment Clause test is applied, it becomes obvious that a direct effect of the accommodation requirement is to advance religious beliefs.[11] The avowed intent of the 1972 amendment was to permit workers with religious beliefs requiring that they observe their Sabbath on days other than Sunday, the opportunity to follow their conscience even though it interfered with an employer's normal and evenly enforced work rules. *See*, Remarks of Senator Randolph, 118 Cong. Rec. 705-06 (1972). Moreover, the sponsor of that amendment indicated that it was prompted partly by the falling attendance at certain religious services. *Id.* at 705. While it is true

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[11] *Amicus* submits that the Establishment Clause prohibits advancement of religious beliefs, as well as advancement of organized religions. "Religion" is used only once in the Religion Clauses and since under the Free Exercise Clause it refers to all forms of religious practices and beliefs, *Gillette* v. *United States*, 401 U.S. 437 (1971), so too must that be its meaning in the Establishment Clause. *See, Everson* v. *Board of Education, supra* note 5, 330 U.S. at 31-33 (Rutledge, J. dissenting).

that the primary effect of Title VII's general religion provisions in Section 703 is against discrimination, the same is not true for the accommodation provision of that Act; the *sole* effect of such a provision is to advance the religious beliefs of those demanding its enforcement. This, *amicus* submits, is contrary to the Establishment Clause.

This conclusion is buttressed by the third prong of the test. In its decision in the case at bar, the court of appeals concluded that neither the regulation nor the amendment raised the "spectre of excessive government entanglement with religion." Pet. App. D. at 38a. *Amicus* respectfully disagrees with that conclusion. *See*, p. 16, *supra*. Moreover, in reaching that conclusion, the appellate court failed to consider "one of the principal evils against which the First Amendment was intended to protect." *Lemon* v. *Kurtzman*, *supra*, 402 U.S. at 622. And that was the "entanglement in the broader sense of continuing political strife." *Committe For Public Education* v. *Nyquist*, *supra*, 413 U.S. at 794; *Meek* v. *Pittenger*, *supra*, 421 U.S. at 372. In all three of the above cases, this Court recognized the potential divisiveness of conflict over religious matters, and the need to avoid either the government's entanglement in such matters, or the government creating situations in which conflict along religious lines is probable.

In the case at bar, the accommodation requirement caused dissension among the employees over respondent receiving special treatment because of his religious beliefs. Surely, such dissension can seriously endanger morale, even if it does not reach "chaotic personnel problems," as long as the demands of justice are ignored. *Accord*, *United States* v. *Lowden*, 308 U.S. 225, 236 (1939). But more importantly, the Establishment Clause was intended to prevent such dissension from

being created in the first place by governmental action, irrespective of whether it reached chaotic proportions. The conflict among employees which has already arisen in the case at bar, and which very probably will arise again when an employee, because of his religious beliefs, is granted preferential treatment, [12] "compels the conclusion that . . . [Section 701(j) as interpreted by the court of appeals] violates the constitutional prohibition against laws 'respecting an establishment of religion.'" *Meek* v. *Pittenger*, *supra*, 421 U.S. at 372.

D. Title VII's ban on religious discrimination is not unconstitutional; only the accommodation provisions violate the Religious Clauses.

In arguing that Title VII's religious accommodation provision violates the First Amendment, *amicus* IAM wishes to emphasize that it is not suggesting that Section 703 of Title VII, as amended, is unconstitutional in prohibiting religious discrimination. *Amicus curiae* respectfully submits that Congress may properly prohibit discrimination because of religion in private employment, but as we have argued above, the tension between the Religion Clauses of the First Amendment does not permit *discrimination in favor of religious beliefs*. The facts of the case at bar demonstrate the inadvisability and impropriety of the government attempting to prohibit all burdens in employment caused by an individual's religious beliefs. By protecting respondent from the burdens of his religious beliefs, Title VII's accommodation

[12] Dissension among employees over preferential treatment is a very real factor because items such as seniority rights, including such benefits as weekends off, are jealously guarded and frequently cause conflicts. *See generally*, *American Airlines, Inc.* v. *CAB*, 445 F.2d 891 (2d Cir. 1971), *cert. denied*, 404 U.S. 1015 (1972). This problem becomes more susceptible for explosion when religion is added to the mixture.

provision required both the company and respondent's fellow supervisors to pay for his religious practices by loss of efficiency on the part of the employer, and worsened working conditions for the fellow employees.

Amicus IAM is not unsympathetic to respondent's plight. The IAM realizes that the position it advocates requires respondent to find employment where he does not have to work on his Sabbath or else forego his religious principles. This may be a painful choice, but as Judge Learned Hand wrote in an analogous situation:

> We must accommodate our idiosyncrasies, religious as well as secular, to the compromises necessary in communal life: and we can hope for no reward for the sacrifices this may require beyond our satisfaction from within, or our expectations of a better world. *Otten* v. *Baltimore & O. R. R., supra,* 205 F.2d at 61.

"The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn." *Lemon* v. *Kurtzman, supra,* 403 U.S. at 625; *see also, Committee For Public Education* v. *Nyquist, supra,* 413 U.S. at 788-89.

II. THIS COURT IN THE EXERCISE OF ITS SUPERVISORY POWERS SHOULD SET FORTH GENERAL GUIDELINES IN ITS DECISION BY WHICH EMPLOYERS, UNIONS AND EMPLOYEES WILL BE ABLE TO GAUGE THEIR RIGHTS AND DUTIES UNDER TITLE VII'S BAN ON RELIGIOUS DISCRIMINATION.

At the present time the law in the area of Title VII's ban on religious discrimination is, to say the least, unsettled. Organizations such as the IAM which represent employees throughout the United States are presently in a precarious position because their rights and duties under Title VII in this area vary from Circuit to

Circuit, and even from panel to panel within Circuits. *Compare, Hardison* v. *Trans World Airlines, Inc., supra, with Reid* v. *Memphis Publishing Co.* [*Reid II*], 521 F.2d 512 (6th Cir. 1975), *pet. for cert. pending; and, Johnson* v. *U.S. Postal Service, supra. See also, Yott* v. *North American Rockwell, supra* note 9; *McDaniel* v. *Essex International, Inc.*, W.D. Mich. No. G74-288 C.A., *appeal pending* (attached hereto as Appendix A). Hopefully, this Court's decision in the case *sub judice* will shed some light on an otherwise confused area.

If this Court should accept *amicus* IAM's position that only Section 701(j) and Regulation § 1605.1 are unconstitutional, Title VII through Section 703 will still provide an effective tool to prohibit religious discrimination. Under that remaining section, employers, unions and employment agencies will be prohibited from discriminating against an employee or a prospective employee because of his religious beliefs. And, as is the case in those situations involving charges under Section 703 for racial or other forms of discrimination, the employee bears the initial burden of establishing a *prima facie* case. *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 802 (1973). Even under *amicus'* suggested approach to this case, accommodations are not immaterial, for under the rationale of *Albemarle Paper Co.* v. *Moody, supra,* 422 U.S. at 425, evidence of a failure to attempt an accommodation may be circumstantial evidence of an intent to discriminate in appropriate circumstances.

If on the other hand this Court should conclude that Title VII's accommodation requirement is constitutional, *amicus* still urges this Court to reconsider the burden of proof requirement imposed by Regulation § 1605.1(c). As *amicus* has argued above, *supra* pp. 12-14, that section of the regulation and its application by

the court of appeals below require an employer or union to prove a negative, an impossible burden. Moreover, an employer's or a union's defense may be effectively rebutted by a showing of any form of "reasonable" accommodation even though it had not been considered and rejected by the employer or the union at the time of the alleged discriminatory act.

Amicus curiae respectfully suggests that, in the event that this Court rejects the IAM's argument on the constitutionality of Section 701(j), it apply the burden of proof formulation set forth in *McDonnell Douglas* and *Albemarle* to religious discrimination cases. *Amicus* submits that in light of the almost dearth of evidence of religious discrimination, *e.g.*, 110 Cong. Rec. 1529 (1964), there is no support for the EEOC's position in the regulation, § 1605.1(c), that due to the "particularly sensitive nature of discharging or refusing to hire an employee . . . on account of his religious beliefs," the employer must bear the burden of proof. *Amicus* IAM submits that the area of religious discrimination is today no more "sensitive" than that of racial discrimination; and since the *McDonnell Douglas—Albemarle* standard does not place the burden on a defendant in racial cases, there is no rational basis to do so in cases involving religious discrimination. *Cf., Reed* v. *Reed*, 404 U.S. 71 (1971).[13] Moreover, employers and unions should not be required to disprove the reasonableness of accommodations suggested *after* the alleged discriminatory act. Under the rationale of *Albemarle*, the defending parties could show that their suggested accommodation was reasonable, and then it would be open to the complaining party to show that other accommodations would serve an employer's legitimate purposes

[13] Section 701(j) is not a barrier to the removal of this irrational burden for it is subject to the same attack on its allocation of the burden of proof as is the EEOC regulation.

just as well. This would merely be rebuttal evidence attempting to show that the defending party's suggested accommodation was a " 'pretext' for discrimination." *Albemarle Paper Co.* v. *Moody, supra.*, 422 U.S. at 425.

CONCLUSION

Amicus Curiae IAM respectfully suggests that the judgment of the Court of Appeals be reversed.

Respectfully submitted,

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May 15, 1976

APPENDIX

APPENDIX A

UNITED STATES OF AMERICA
IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

(Filed January 13, 1976)

K74-288 C.A.

DORIS MCDANIEL, *Plaintiff*,

v.

ESSEX INTERNATIONAL INC., aka
ESSEX WIRE, a Michigan corporation, and INTERNATIONAL
ASSOCIATION OF MACHINISTS, LOCAL LODGE NO. 982,
Defendants.

Opinion

Plaintiff Doris McDaniel brought suit against her employer, Essex International, Inc., and the union which, under the National Labor Relations Act, represented employees in the bargaining unit in which plaintiff accepted employment at Essex on October 15, 1972. In her suit, plaintiff, a member of the Seventh-Day Adventist Church, claimed that the union's enforcement of a "union shop" agreement with Essex violated plaintiff's rights under the United States Constitution, Title VII of the Civil Rights Act of 1964, as amended, and the Constitution and Fair Employment Practices Act of the State of Michigan. After considering plaintiff's complaint and the exhibits filed with her brief in opposition to defendants' motion to dismiss, this court concludes that as a matter of law, plaintiff has failed to state a claim upon which relief may be granted.

When plaintiff accepted employment at Essex, the company and Local Lodge 982 of the International Association of Machinists and Aerospace Workers had a collective bar-

gaining agreement in effect which contained a union security agreement authorized by Sections 8(a)(3) and 8(b)(2) of the National Labor Relations Act, 29 U.S.C. §§ 152(a)(3), (b)(2). That agreement provided that all employees represented by Local 982, as a condition of continued employment, had to become a member of the union within forty-five days of hire. If an employee failed to abide by that agreement, the company had to discharge that employee within three days of a request by the union. Plaintiff, because of her religious beliefs, refused to pay her full dues to the union, offering instead to pay an amount equivalent to her periodic union dues to a non-religious charity. Local 982 declined that offer. After being warned of the consequences of her continued refusal, plaintiff persisted in her refusal to pay the full dues and was discharged on December 28, 1972. Plaintiff was not required to join the union nor was she asked to adopt its ideological principles.

While plaintiff has based her constitutional challenge on several amendments to the Federal Constitution, only plaintiff's First Amendment challenge merits discussion. An identical argument based upon the First Amendment's protection of the free exercise of one's religion was made and rejected in Hammond v. United Paperworkers Union, 462 F.2d 174 (6th Cir.), cert. denied, 409 U.S. 1028 (1972). In Hammond, this court rejected a challenge by a member of the Seventh-Day Adventist Church to the enforcement of a union shop agreement because, upon balance, the strong governmental interest in authorizing union shop agreements was found to be compelling and controlling over the right of the individual to the free exercise of religious beliefs. That conclusion was affirmed on appeal. That same balancing of competing interests requires that plaintiff's First Amendment claim be dismissed.

Since unions have the duty to represent all members of their bargaining unit regardless of their union affiliation, Steele v. Louisville & N.R.R., 323 U.S. 192, 201-02 (1944),

Congress concluded that *all* members of the bargaining unit should pay their "fair share" of the costs of securing benefits for, and of representing members of that bargaining unit. Railway Employees' Dept. v. Hanson, 351 U.S. 225, 231 (1956). Besides eliminating "free riders," the requirement that all employees represented by a union pay dues to that union serves the important purposes of counterbalancing the economic power of the corporate structure, and of removing the disruptive effects of union members being required to share their achievements. See, Linscott v. Millers Falls Co., 440 F.2d 14, 18 n.3 (1st Cir.), cert. denied, 404 U.S. 872 (1971). All of those purposes of union shop agreements serve the valid Congressional interest in promoting industrial peace along the arteries of commerce. International Assoc. of Machinists v. Street, 367 U.S. 740 (1961); cf., United States v. Lowden, 308 U.S. 225 (1939). But mindful of the interests of the individual employees, Congress did not authorize a complete form of union shop. It "whittled down [the 'membership' requirement] to its financial core" [1] by permitting enforcement of a union shop agreement only to require employees to pay dues to the union. See, NLRB v. Hershey Foods Corp., 513 F.2d 1083 (9th Cir. 1975). Union dues required under a union shop agreement, thus, "simply constitute a 'tax' in support of the collective bargaining efforts of the union." Gray v. Gulf, M. & O. R.R., 429 F.2d 1064, 1072 (5th Cir. 1970), cert. denied, 400 U.S. 1001 (1971). Consequently, any infringement upon an individual's free exercise of her religion is limited and must be subordinate to the compelling governmental interest in favor of such a tax.

Plaintiff's addition of a claim under Title VII of the Civil Rights Act of 1964, as amended, does not require a different result. Union shop agreements and their even-handed enforcement serve a necessary "business purpose" of unions. Requiring a union to waive its right to have all

[1] NLRB v. General Motors Corp., 373 U.S. 734, 742 (1963).

pay their "fair share" would be an undue hardship upon the union and its other members. Moreover, the "accommodation" required by Section 701(j), 42 U.S.C. § 2000e(j), is the same as that required under the First Amendment by the balancing of interests test used in Hammond. Congress effected the reasonable accommodation required by Title VII when it balanced the competing interests in enacting the union shop provisions of the Taft-Hartley Act of 1947. 29 U.S.C. §§ 158(a)(3), (b)(2).[2]

Since defendants are entitled to judgment on the merits as a matter of law, their motions in the nature of motions for summary judgment will be granted.

Dated: January 13th, 1976.

/s/ Noel P. Fox
Chief District Judge

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[2] Plaintiff's claim under the laws of the State of Michigan must also fail for those laws parallel both the U.S. Constitution and Title VII. Since plaintiff has failed to state a claim under federal constitutional or statutory law, she has also failed to state a claim under the Michigan Constitution and Fair Employment Practices Act.

UNITED STATES OF AMERICA
IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

G74-288 C.A.

Doris McDaniel, *Plaintiff*,

v.

Essex International Inc., aka
Essex Wire, a Michigan corporation, and International
Association of Machinists, Local Lodge No. 982,
Defendants.

Opinion Denying Motion for Rehearing and Partially Modifying the Judgment

On January 13, 1976, this court issued an opinion and order granting summary judgment to defendants in a suit alleging religious discrimination in the collection of union dues pursuant to a "union shop" agreement. Plaintiff filed a timely motion for rehearing, assigning numerous errors. In addition, the United States Equal Employment Opportunity Commission requested leave to file a brief as *amicus curiae*.

After carefully reviewing the plaintiff's motion and supporting memoranda, this court concludes that no useful purpose would be served by granting a rehearing. With the single exception noted below, the court reaffirms its original ruling. The motion of the EEOC for leave to file an *amicus* brief is denied; the agency's views can more appropriately be addressed, at this juncture, to the Court of Appeals.

In light of plaintiff's arguments, the court has reconsidered its disposition of the pendent state claims. Accordingly, the original judgment is modified by deletion of footnote 2 from page 4 of the opinion. Since relief has been denied on the federal claim, and since the pendent

claim concerns unresolved questions of state law, this court declines to exercise its jurisdiction over the state claim, and makes no ruling on the merits of that issue. The judgment entered January 13, 1976 is otherwise unaltered.

IT IS SO ORDERED.

Dated: March 15, 1976.

/s/ NOEL P. FOX
Chief U. S. District Judge